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UNITED STATES OF AMERICA	)	
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	)	<b>DEFENSE MOTION TO</b>
	)	<b>DISMISS ALL CHARGES AS</b>
v.	)	<b>THE COMMISSION HAS NO</b>
	)	<b>JURISDICTION AT</b>
DAVID M. HICKS	)	<b>GUANTANAMO BAY, CUBA</b>
	)	
	)	<b>1 October 2004</b>

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The defense in the case of the *United States v. David M. Hicks* moves for dismissal of all charges against him because the military commission lacks jurisdiction to try Mr. Hicks at Guantanamo Bay, Cuba for alleged violations of the law of war occurring in Afghanistan, and states in support of this motion:

1. **Synopsis:** The military commission lacks jurisdiction to sit at Guantanamo Bay to try alleged offenses that occurred in Afghanistan.
2. **Facts:** All charges against Mr. Hicks involve alleged conduct within the territorial boundaries of Afghanistan.
3. **Discussion:** The power to convene a military commission as an exercise of military jurisdiction is derived from the customs and practice under the laws of war. As detailed below, military law doctrine and Supreme Court cases, military commissions can be convened by a competent authority to sit: (1) in the zone where an actual armed conflict exists; (2) in an area under martial law; or (3) within the occupied territory that the convening authority commands. The Guantanamo Bay Naval Base falls into none of these categories.

As described by Winthrop, the exercise of military jurisdiction is restricted in several important respects:

(1) A military commission, (except where otherwise authorized by statute,) can legally assume jurisdiction only of offenses committed within the field of the command of the convening commander. Thus a commission ordered by a commander exercising *military government*, by virtue of his occupation, by his army, of territory of the enemy, cannot take cognizance of an offense committed without such territory.

(2) The place must be the theatre of war or a place where military government or martial law may be legally exercised; otherwise a military commission, (unless specially empowered by statute,) will have no jurisdiction of offenses committed there. The ruling in the leading case of *Ex parte Milligan*, that a military commission, which had assumed jurisdiction of offences committed in 1862 in Indiana,—a locality not involved in war nor subject to any form of military dominion,—had exceeded its powers, has been referred to ... where also the fields of military government and martial law have been defined.

(3) It has further been held by English authorities that, to give jurisdiction to the war-court, the *trial* must be had within the theatre of war, military government, or martial law; that, if held elsewhere, and where the civil courts are open and available, the proceedings and sentence will be *coram non iudice*.<sup>1</sup>

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<sup>1</sup> Winthrop, "Military Law and Precedent," Vol.2. (1896) p. 836.

Congress has not passed any statute expanding the jurisdiction of military commissions beyond what was authorized in World War II, the last time commissions were employed. The majority of the military commissions used during World War II sat in Germany and areas of the Far East (*i.e.*, Japan, China, Philippines, Guam) to try offenses against the law of war that had occurred in those theatres of war. These commissions were convened under the authority of the military commander responsible for those areas.

For example, General Yamashita, Commanding General of the Fourteenth Army Group of the Imperial Japanese Army, was tried for law of war violations which occurred within the Philippine Islands. The commission sat in Manila and was convened by General Stryer, Commander of the United States Armed Forces, Western Pacific (which included the Philippine Islands). The United States Supreme Court reviewed the military commission that tried General Yamashita and found that the exercise of military jurisdiction in the form of a military commission was proper.

The Court specifically noted that General Stryer's authority to appoint the commission was proper, as he was the military commander over the Philippine Islands, "where the alleged offenses were committed, where [Yamashita] surrendered as a prisoner of war, and where, at the time of the order convening the commission, he was detained as a prisoner in custody of the United States Army."<sup>2</sup> In fact, the Supreme Court found that the location of the commission was a key element to its proper creation and exercise of military jurisdiction over General Yamashita.

Similarly, in 1946, a group of German civilians were tried by military commission in China for violations of the laws of war consisting of assisting the Japanese Army during World War II. The alleged violations occurred within China, the commission was conducted there, and the commission was convened under the military authority commanding the China Theatre.<sup>3</sup>

Even when military commissions have sat within the United States to try enemies, in every case the offenses were alleged to have occurred within the United States, and the commissions were convened by a military commander of the area. During World War II, two military commissions sat within the United States, in the Eastern Defense Command's area of responsibility, to try alleged law of war violations committed within that area. The commission in *Ex Parte Quirin* was constituted under that authority,<sup>4</sup> and was appointed by the President during a congressionally declared war. The commission in *Quirin* sat in the District of Columbia to try enemy operatives apprehended in the United States in the course of a clandestine sabotage mission. As a principal component of its presentation in *Quirin*, the prosecution introduced evidence that the Eastern Coast, the site of the Germans' infiltration, was within an area under military control. Thus, the prosecution offered, *inter alia*, "Public Proclamation No. 1," in which the Commander of the Eastern Defense Command and First Army established both military control over the geographical region in which the offenses occurred, and punishments for

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<sup>2</sup> See *In Re Yamashita*, 327 U.S. 1, 10 (1946). Available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=search&court=US&case=/us/327/1.html>.

<sup>3</sup> See *Johnson v. Eisentrager*, 339 U.S. 763 (1950). Available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=339&invol=763>.

<sup>4</sup> 317 U.S. 1 (1942).

violations of any restrictions or orders. The site of the trial, Washington D.C., was within the region under military control.<sup>5</sup>

Indeed, a military commission in which alleged violations of the law of war committed in a foreign country, with the accused removed from the country or area where the alleged offense occurred, and brought before a military commission outside the theatre of war, is unprecedented and without legal basis or authority under the customs and laws of war. Proper authority to use military commissions is derived from a valid exercise of military jurisdiction, which can only be established in the theatre of war in which the alleged offenses occurred.

Here, the government removed Mr. Hicks from Afghanistan, the only place military jurisdiction could have been exercised over him, and transported him to Guantanamo Bay Naval Base, a place located far from any theatre of operations. Ironically, while memoranda published subsequently establish that the removal of Mr. Hicks (and others) was designed to place him beyond the reach of federal courts and other lawful, independent courts and process [a ploy the Supreme Court rejected in *Rasul v. Bush*, *Rasul v. Bush*, \_\_\_ U.S. \_\_\_, 124 S. Ct. 2686 (2004)], all the removal accomplished was to deprive this commission of jurisdiction to try Mr. Hicks for the offenses charged. In addition, this commission is not appointed by a commander possessing authority over military operations in Afghanistan. Accordingly, this military commission lacks jurisdiction to sit in Guantanamo Bay to try the offenses charged against Mr. Hicks.

**4. Evidence :**

**A:** The testimony of expert witnesses.

**B:** Attachments

1. Winthrop, "Military Law and Precedent," Vol.2. (1896) p. 836.
2. *In Re Yamashita*, 327 U.S. 1, 10 (1946).

**5. Relief Requested:** The defense requests the charges be dismissed.

6. The defense requests oral argument on this motion.

By: \_\_\_\_\_  
M.D. MORI  
Major, U.S. Marine Corps  
Detailed Defense Counsel

JOSHUA L. DRATEL  
Joshua L. Dratel, P.C.  
14 Wall Street  
28<sup>th</sup> Floor  
New York, New York 10005  
(212) 732-0707  
*Civilian Defense Counsel for David M. Hicks*

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<sup>5</sup> See Joel Samaha, Sam Root, and Paul Sexton (eds.), "Transcript of Proceedings before the Military Commission to Try Persons Charged with Offenses against the Law of War and the Articles of War, Washington D.C.," 8 to 31 July 1942, University of Minnesota, 2004. Available at <[http://www.soc.umn.edu/~samaha/nazi\\_saboteurs/nazi02.htm](http://www.soc.umn.edu/~samaha/nazi_saboteurs/nazi02.htm)>.